Eagle Transport Corporation *and* International Brotherhood of Teamsters-Tankhaul Division, AFL–CIO, Local 528, Petitioner. Case 10–RC–14919

March 31, 1999

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

The National Labor Relations Board, by a three-member panel, has considered objections to an election held June 25, 1998, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 11 for and 22 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and brief,[1] and has decided to adopt the hearing officer's findings and recommendations only to the extent consistent with this Decision and Certification of Results of Election.

The Petitioner's objections allege that the Employer interfered with employees' free choice by referring to letters from customers in meetings held with its employees during the critical period prior to the election, and by thereafter posting four customer letters. The Employer has excepted to the hearing officer's recommendation that the latter objection be sustained. For the reasons set forth below, we disagree with the hearing officer's recommendation that that objection be sustained.

The Employer is engaged in the transportation of petroleum products. The Employer's customers are major oil companies and small distributors of petroleum products. The Union is seeking to represent the drivers employed at the Employer's Doraville, Georgia terminal.

During the Union's organizing campaign, the Employer conducted several meetings with its employees to convey its opposition to unionization. The Employer's director of operations, Ron Thomas, told employees at one meeting that job security is provided by customers, that without customers the jobs would cease to exist, and that the nature of the petroleum supply industry was that competitors were continuously trying to take customers away. At a subsequent meeting, the Employer's vice president, Bob Heinisch, made reference to letters the Employer had received from four of its customers. He stated that he would not discuss the content of the letters at the meeting, but rather would post the letters at a later date.

The Employer thereafter posted the four customer letters on a green poster board which was prominently displayed next to a glass-enclosed bulletin board in the hallway of the Employer's facility. Written on the bottom of the poster board was "VOTE NO!!" and an "x" mark in a rectangular box. The hearing officer found that the poster was displayed from June 19 to 23, 1998, 2 days before the election. The letters each essentially state that it had come to the customer's attention that the Employer's drivers were considering unionizing and, if that occurred, the customer might need to make other business arrangements.[2] The posted letters were the subject of repeated conversations among the employees prior to the election. All the letters were addressed to the Employer's marketing representative for Georgia, Jay Swanger.

The hearing officer concluded that the posting of the letters constituted objectionable conduct. She found that the Employer failed to proffer any direct evidence to authenticate the letters. Absent such authentication, the hearing officer reasoned that the Employer could not rely on the contents of the four letters for the truth of the matters asserted therein because, in the hearing officer's view, the letters were nothing more than hearsay documents. Therefore, the hearing officer found that the Employer had failed to establish that it had an objective factual basis upon which to believe that the letters conveyed demonstrably probable consequences beyond its control, as required by *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969). She further found that the Employer had actually solicited the letters from the customers. The hearing officer stated:

[1] The Employer was the only party to file a brief.

[2] The letters provide in pertinent part:

> It has come to our attention that Eagle may be unionized in the near future. Although we have enjoyed a very good business relationship with Eagle in the past, we feel that in order to give our customers the very best service we will need to make a change if that happens. As you know, the margins in the gas business are so low and the competition at the retail level so intense that we need to keep all our costs down as low as possible. Please keep me informed. . . . [Letter from Dekalb Petroleum, Inc.]
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> It has been brought to our attention that Eagle Transport drivers are considering unionizing. This very much concerns us in that rates will likely rise. Because of this new development, we just want to let you know that we are in the market of looking for a new transport service as we must keep costs as low as possible. Please keep us informed. . . . [Letter from P & B Petroleum Co.]
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> It has been brought to our attention that Eagle Transport may possibly be going to unionized drivers. That being the case, Clayton Oil may need to make other arrangements due to the circumstances of our operation. I would appreciate being kept advised. . . . [Letter from Clayton Oil Co.]
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> We have heard rumors that drivers of petroleum carriers are considering joining a union in the Atlanta area. As you know, we did not replace our transport after the fire in 1995 and have used outside carriers to move our product since that date. These outside carriers have done a satisfactory job thus far and we will continue using their services in their present structure. Please keep us advised on the activity of this possibility of a union structure. We will have to take a long hard look at the ramifications which may exist should this come about. With all the rules and regulations of a union shop we would have to consider putting our own unit into service and hiring our own drivers. This allows us a lot more flexibility in truck utilization and could be a cost saver as well. [Letter from Lance Oil Co.]

> [T]he letters were merely a tool of the Employer's to assist in its campaign to defeat the Union and . . . their posting interfered with the employees' free choice in the election by indirectly threatening the loss of employment due to loss in business as a consequence of unionization.
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> . . . [T]he Employer accomplished through the apparent auspices of its customers . . . what it could not do directly, i.e., to threaten its employees with the loss of employment because they sought to be unionized.

The hearing officer thus recommended that the Petitioner's objection regarding the posting of the letters be sustained.[3]

Having carefully reviewed the record, we find, for the reasons set forth below, that the Employer's communications with its employees did not exceed the bounds of permissible campaign statements.

Initially, we observe that: "[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB v. Gissel Packing Co.,* supra at 618. An employer may even make a prediction as to the precise effects that he believes unionization will have on his company. However, any such prediction "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control" or to convey a management decision already made. Id. Applying this standard here, we find, contrary to the hearing officer, that the Petitioner's objections should be overruled.

The record does not support the hearing officer's findings that the customers' letters had not been properly authenticated and that they had been admitted into the record for the limited "purpose of what had been allegedly referred to in the captive audience [employee] meetings and then posted for employees to view." On the contrary, the record clearly shows that the letters were admitted into evidence without any objection or limitation. Indeed, the hearing officer herself stated on the record that the letters "were stipulated to prior to the hearing[.]" No question was raised at any time by either party as to the authenticity of the letters, despite constant mention of the letters at the hearing. At no time during the course of the hearing did the hearing officer advise the parties that she was accepting the letters into evidence for a limited purpose. Under these circumstances, it was error for the hearing officer to disregard the parties' stipulation and conclude, sua sponte, after the close of the hearing, that the letters had not been properly authenticated.[4]

The record, thus, shows that the Respondent received the letters from its customers and thereafter posted them. The posted letters accordingly constitute actual customer statements that they may need to make "other arrangements" for petroleum suppliers if unionization of the Employer occurred. The Employer accurately conveyed these customer statements to employees by posting the letters verbatim. Most significantly, the posting did not go beyond the objective facts—what was actually stated in the letters. We accordingly find that the Employer's posting of the letters was supported by objective fact under *Gissel*, conveyed demonstrably probable consequences beyond the Employer's control, and thus did not constitute objectionable threats.[5]

The hearing officer credited the testimony of the Employer's witnesses that it did not discuss or characterize the content of the customer letters at its meetings with employees, but rather stated that it would post the letters. The Employer, thus, comported with the Court's admonition in *Gissel* that coercive speech can be averted by "avoiding conscious overstatements [the employer] has reason to believe will mislead his employees." Id. at 620. We accordingly find no merit in the Petitioner's objection asserting that the Employer engaged in objectionable conduct by merely making reference to the letters at its employee meetings.

We note that the burden is on the Union, as the objecting party, to show that the Employer engaged in objectionable solicitation of the letters from its customers. We find that the Union has failed to meet its burden here, as the record fails to show that the Employer solicited the letters from its customers. In finding the objectionable conduct, the hearing officer primarily relied on the testimony of Director of Operations Thomas. He testified that Marketing Representative Swanger had told custom-

[3] The hearing officer accordingly found it unnecessary to pass on the Petitioner's objection asserting that the Employer improperly referenced the four customer letters in the employee meetings.

[4] See McCormick, *Evidence*, § 54 (2d ed. 1972). ("If the evidence is received without objection, it becomes part of the evidence in the case, and is usable as proof to the extent of the rational persuasive power it may have.")

In addition, the hearing officer drew an adverse inference from the Employer's failure to call its Marketing Representative Swanger to authenticate the letters. Given our finding, above, however, that the letters were admitted into evidence without objection or limitation, we reverse the hearing officer on this point as well and conclude that the Employer was not obligated to call Swanger to authenticate them.

[5] See *Long-Airdox Co.*, 277 NLRB 1157, 1158 (1985) (employer lawfully told employees that a customer would be "very apprehensive of ever sending any work" to the employer in the event of unionization; employer's statements were corroborated by testimony of customer).

By contrast, in *Reeves Bros*., 320 NLRB 1082, 1083 (1996), on which the hearing officer relied, the Board found that the employer's statement that customers "would remove their business" in the event of unionization "went beyond the objective facts (what was actually said in the customer letters)" and constituted a threat of reprisal. Unlike *Reeves*, here, as emphasized above, the Employer merely posted the actual customer letters it received and thus did not go "beyond the objective facts."

ers that "if the customers [felt] that strongly about the [union] situation they needed to put it in writing." This testimony does not establish that the Employer approached its customers to obtain the letters from them. Indeed, the record is silent as to who approached whom. Thus, an equally plausible reading of this testimony is that the customers initiated the conversations because of their concern about the union situation. Further, even if the Employer initiated the conversation, the evidence does not establish that it told the customers to write letters. The Employer merely told them that *if* they felt strongly about the Union, they should put their views in writing. Further, the fact that the letters were similar does not establish that the Employer solicited the letters. Finally, the record fails to establish that the letters represented anything other than the genuine views of the customers.[6] We do not believe that it was objectionable for the Employer to share those views with its employees. Phrased differently, the Employer was not required to withhold this relevant information from its employees.

Finally, the hearing officer stated that "it is difficult to understand the urgency" of the concerns expressed by three of the four customers because they were operating under contracts with the Employer, two of the customers had recently signed 3-year contracts in March 1998, and one of the customers (Lance Oil Co.) no longer used the Employer as its primary petroleum carrier. It is, however, not the proper role of a hearing officer to second-guess business judgment or "give . . . gentle guidance by over-the-shoulder supervision." *NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956). In any event, the hearing officer's speculation is in conflict with the record, which shows that the Employer was actively seeking to regain the business of Lance Oil, that customers have breached their contracts with the Employer in the past, and that the contract of at least one customer was due to be renegotiated in the near future. In sum, the evidence relied on by the hearing officer falls far short of establishing that objectionable solicitation occurred.[7]

Accordingly, for all these reasons, we overrule the Petitioner's objections and, as the Petitioner has failed to secure a majority of the valid ballots cast, we shall certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for International Brotherhood of Teamsters-Tankhaul Division, AFL–CIO, Local 528, and that it is not the exclusive representative of these bargaining unit employees.

MEMBER LIEBMAN, concurring in part and dissenting in part.

I agree with my colleagues that the four "customer letters" that are the subject of the Petitioner's objections were admitted into evidence without objection or limitation and, therefore, it was error for the hearing officer to conclude that the letters had not been properly authenticated.

Contrary to my colleagues, however, I would find that the record supports the hearing officer's key finding that the Employer solicited the letters from its customers. In my view, it is highly improbable that, within a brief period of time, the Employer would independently receive four letters from four major customers (or potential customers), all addressed to the same Employer official, using similar wording and expressing similar concerns over the consequences of unionization. In these circumstances, the inference is warranted, and I would draw it, that the letters were prepared at the behest of and reflected the views of, the Employer, not the customers.

Under *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969), an employer may advise employees of the statements actually made by its customers concerning the effect unionization may have on the customer's willingness to continue doing business with the employer. See the discussion in *Reeves Bros*., 320 NLRB 1082, 1083 (1996). This is so because the customer's actual statements constitute "objective facts" within the meaning of *Gissel*. Id. Customer statements that are solicited by an employer, however, call into question the objective factual nature of the statements; whether the statements indeed are beyond the employer's control; and whether they are an accurate representation of the customer's position absent employer involvement. In this case, there was nothing "objective" or "factual" about so-called "customer letters" because the Employer was the real party responsible for the dire statements they contained predicting loss of business.

There can be no dispute that statements that appear to be from customers raising the specter of cessation of business with the employer in the event of unionization will have a highly significant impact on employee choice in representation elections. The Board's fundamental responsibility to safeguard free and fair elections requires that we ensure that such statements are genuine. The Board's failure to do so permits an employer to accomplish indirectly through its customers what the Act prohibits the employer from doing directly: threatening employees with loss of employment because they seek to be unionized. I agree with the hearing officer that the "customer letters" were not genuine and that it was objectionable for the Employer to post them.

[6] We find no basis for our dissenting colleague's inference that the letters reflected the views of the Employer and not the customers. This inference is wholly speculative and is not supported by the record evidence.

[7] The dissent, in agreeing with the hearing officer's conclusion, assigns unwarranted probative weight to the evidence relied on by the hearing officer which is, at best, ambiguous and speculative.